

## INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS: 3 ISSUES

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### A. INTRODUCTION

Independence and impartiality of arbitrators are derived from their essential obligation towards the arbitrating parties, which is the adjudication of the dispute submitted to their jurisdiction in the arbitration agreement. This obligation is an accepted principle of arbitration laws in Europe.<sup>1</sup> The relationships between the parties to the arbitration and the arbitrators themselves are in the nature of a contract, as can be deduced from the bilateral source of an arbitrator’s appointment, even when nomination is made at the initiative of one party, such as the nomination of a co-arbitrator. Thus, the choice of an arbitrator by one party is part of a contractual scheme between the parties and the arbitrator.<sup>2</sup>

The United Kingdom Supreme Court highlighted in *Jivraj v. Hashwani*<sup>3</sup> that, “[i]t is common ground, at any rate in this class of case, that there is a contract between the parties and the arbitrator or

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1. See, e.g., *L’impartialité du juge et de l’arbitre*, Etude de droit comparé, J. van Compernelle, dir. Bruylant, 2006.

2. THOMAS CLAY, *L’ARBITRE* [THE ARBITRATOR] 482 (2001).

3. *Jivraj v. Hashwani*, [2011] UKSC 40, [23] (appeal taken from Eng.).

arbitrators appointed under a contract and that his or their services are rendered pursuant to that contract.” As explained by the Cour de cassation in a judgment delivered in 1972 in the *Consorts Ury* case in France, “[t]he appointment of each arbitrator is not a unilateral act, even when initiated by one party alone. [It] results from the common intention of the parties, who take into account the qualities of the person whom they call upon to judge their dispute.”<sup>4</sup> Similarly, in *Raffineries de Homs*, the Paris First Instance Court decided that “[a]n arbitrator – who is a judge, not a representative of the party that appointed him – must derive his judicial powers from a single, common manifestation of the intentions of the parties to the arbitration proceedings, even though his appointment may have been initiated by one party alone.”<sup>5</sup>

This view is also propounded by Phillipe Fouchard in his Report to the ICC on the status of arbitrators in 1995:

[t]he settlement of a dispute is not an ‘undertaking’ or a ‘work’ as such. Admittedly, the arbitrator is bound to comply with [the] arbitration agreement and rules that the parties have adopted, but the parties are not allowed to go so far as to give him instructions on the manner in which he is to conduct the proceedings, less still in relation to the direction or content of his decision.<sup>6</sup>

The judgment of the United Kingdom Supreme Court clarifies in *Jivraj*<sup>7</sup> that an arbitrator is not a person employed under a contract to do work within the meaning of the Regulations 2003 on Employment Equality. The Court states,

[t]he arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of

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4. FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 575 (Emmanuel Gaillard & John Savage eds., 1999) (quoting Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Apr. 13, 1972, JCP 1972, II, 17189 (Fr.)).

5. *Id.* (quoting Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Mar. 28, 1984, 1985 REV. ARB. 141 (Fr.)).

6. Phillipe Fouchard, *Les Rapports entre L'arbitre et les Parties et L'institution Arbitrale* [Relationships Between the Arbitrator and the Parties and the Arbitral Institution], in BULLETIN DE LA COUR INTERNATIONALE D'ARBITRAGE DE LA CCI, LE STATUT DE L'ARBITRE: SUPPLEMENT SPECIAL 12, 16 (1995).

7. *Jivraj*, [2011] UKSC, [41].

either party. As the International Chamber of Commerce (“the ICC”) puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties.<sup>8</sup>

The Fouchard Report further stresses that, “[s]uch a classification [as an agency contract] is arguable, since the very purpose of an agency is to grant the agent a power of representation. Yet, the arbitrator does not represent the parties, less still the party that appointed him; the power he is granted is inherently judicial.”<sup>9</sup> The Court of Appeal of Paris also held that far from being an agent of the parties, an arbitrator is an adjudicator.<sup>10</sup> Fouchard suggests that the contract between the parties to the arbitration and the arbitrators has a *sui generis* form: “[I]ndeed the contractual relationship formed between the arbitrator and the parties cannot be categorized as a known type of civil contract. This contract contains the mixed characteristics of arbitration – contractual in source, judicial in object.”<sup>11</sup> His views on the nature of the contract have been endorsed in national case law. Characterization of the contract as a *sui generis* form of agreement has been adopted by the Court of Appeal of Paris<sup>12</sup> and in the concurring opinion of Lord Mance in *Jivraj v. Hashwani*.<sup>13</sup>

Arbitrators serve an adjudicatory role and, as a result, must be independent of the parties and impartial.<sup>14</sup> According to a recent holding of the UK Supreme Court in the case of *Jivraj v. Hashwani*,

[t]he dominant purpose of appointing an arbitrator is the impartial resolution of dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they

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8. *Id.*

9. Fouchard, *supra* note 6, at 15.

10. Cour d’appel [CA] [regional court of appeal] Paris, May 22, 1991, 1e ch., 1996 REV. ARB. 476 (Fr.).

11. Fouchard, *supra* note 6, at 16.

12. Cour d’appel [CA] [regional court of appeal] 1e civ., Paris, Dec. 13, 2001, 2003 REV. ARB. 1312 (Fr.).

13. *Jivraj v. Hashwani*, [2011] UKSC 40, [77] (appeal taken from Eng.).

14. See Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Oct. 28, 1988, 1990 REV. ARB. 497 (Fr.) (recognizing that arbitrators, in executing their judicial function, must be independent and impartial to assure equitable treatment and process).

were not personal services under the direction of the parties.<sup>15</sup>

Similarly, in the *Consorts Ury* judgment of 1972,<sup>16</sup> the Cour de cassation underlined that “[a]n independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, [and it is] one of the essential qualities of an arbitrator.”<sup>17</sup>

Admittedly, an independent arbitrator is typically impartial. An arbitrator may, however, be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence.<sup>18</sup> Independence, which is more an objective concept, may thus be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings. As the English Arbitration Act of 1996,<sup>19</sup> which makes no reference to independence, illustrates, impartiality is the crucial requirement and cannot be waived in advance by parties. As with English law, independence is required of all arbitrators in the majority of other national arbitration laws and many arbitration rules as well.<sup>20</sup>

Through an exploration of case law, particularly case law and procedures in France, this paper will discuss an arbitrator’s duty to disclose, what an arbitrator should disclose, and how and when an institutional decision on the independence and impartiality of arbitrators should take place.

## B. AN ARBITRATOR’S DUTY TO DISCLOSE

Execution of the contract between the parties to the arbitration and

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15. *Jivraj*, [2011] UKSC, [45].

16. Galliard & Savage, *supra* note 4, at 562 (quoting Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Apr. 13, 1972, JCP 1972, II, 17189 (Fr.)).

17. *Id.*

18. Pierre Lalive, *Conclusions*, in INTERNATIONAL CHAMBER OF COMMERCE, THE ARBITRAL PROCESS AND THE INDEPENDENCE OF ARBITRATORS 119–20 (1991).

19. See generally Arbitration Act, 1996, c. 23 (U.K.) (referencing the non-waivable requirement of “impartiality” but omitting any reference to “independence”).

20. JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, DROIT COMPARÉ DE L’ARBITRAGE INTERNATIONAL [COMPARATIVE LAW OF INTERNATIONAL ARBITRATION] 366–70 (2002).

each arbitrator requires consent of all involved.<sup>21</sup> Parties to the arbitration can, however, accept the nomination of an arbitrator if and when they are made aware of the connections which the proposed arbitrator may have with the other parties, their counsel, and, possibly, the other members of the Arbitral Tribunal.<sup>22</sup> Independence is a requirement that is in the parties' interest and which they may waive as acknowledged in the case law of the European Court of Human Rights.<sup>23</sup> It is also accepted in French arbitration law that the parties may waive the independence of the arbitrators, but they can only do so to the extent they are aware of the existing relationships of the arbitrators with the parties or with the parties' counsel.<sup>24</sup> In light of the preceding, an arbitrator's duty to disclose is an essential undertaking for the independent and impartial resolution of the dispute. It has been characterized as the "[c]ornerstone of an arbitrator's duty of independence. . . ."<sup>25</sup>

Currently, disclosure is acknowledged in contemporary arbitration law and practice.<sup>26</sup> The obligation to disclose and to investigate

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21. See Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Apr. 13, 1972, JCP 1972, II, 17189 (Fr.); see also Galliard & Savage, *supra* note 4, at 31 (stating that "[t]he contract between the parties is the fundamental constituent of international arbitration. It is the parties' common intention which confers powers upon the arbitrators.").

22. Cf. GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION, § 4(c)(ii) (Council of the Int'l Bar Ass'n 2004) [hereinafter IBA GUIDELINES] ("All parties must expressly agree that such person may serve as arbitrator despite the conflict of interest.").

23. Suovaniemi v. Finland, App. No. 31737/96, Eur. Ct. H.R. (1999), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=669102&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

24. Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 18, 2004, 2004 REV. ARB. 989 (Fr.).

25. Ahmed S. El-Kosheri & Karim Y. Youssef, *The Independence of International Arbitrators: An Arbitrator's Perspective*, in INTERNATIONAL CHAMBER OF COMMERCE, INDEPENDENCE OF ARBITRATORS: 2007 SPECIAL SUPPLEMENT 43, 51 (2008).

26. See, e.g., Anne Marie Whitesell, *Independence in ICC Arbitration: ICC Court Practice Concerning the Appointment, Confirmation, Challenge and Replacement of Arbitrators*, in INTERNATIONAL CHAMBER OF COMMERCE, INDEPENDENCE OF ARBITRATORS: 2007 SPECIAL SUPPLEMENT 7, 11 (2008) (discussing that in ICC procedure, "[i]n the event of acceptance, the arbitrator must also 'disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties.'").

potential conflicts rests primarily on the arbitrator.<sup>27</sup> A lawyer acting as an arbitrator should perform a conflicts search to inquire about a client-law firm relationship and the parties involved in the arbitration. It should not be permitted for an arbitrator to be declared independent based on the arbitrator's lack of actual knowledge due to a failure to perform a conflict search.<sup>28</sup>

The General Standard 7(a) of the IBA Guidelines on Conflicts of Interest in International Arbitration of 22 May 2004 provides that,

[a] party shall inform the arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so at its own initiative before the beginning of the proceedings or as soon as it becomes aware of such relationship.<sup>29</sup>

This should not be seen as a dilution of the arbitrator's obligation to disclose, but rather as a possibility for the parties to make their own investigation when difficulties arise regarding the arbitrator's disclosure, such as incomplete statements or hesitations on the part of the arbitrator.<sup>30</sup> General Standard 7(b) specifies that, "[a] party shall provide any information already available to it and shall perform a reasonable search of publicly available information."<sup>31</sup> In the case of the non-disclosure of a fact that is known by the arbitrator and a party, shared liability between them could be considered. As between the parties, the other party may claim for a breach of the obligation of loyalty, which flows from the arbitration agreement.

The duty to disclose does not merge in the obligation to be and

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27. Cour d'appel [CA] [regional court of appeal] Paris, Dec. 18, 2003, RG n° 2002/09750, *Annahold*.

28. See IBA GUIDELINES, *supra* note 22, § 7(c) (stating that a "[f]ailure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate."). See generally Arthur W. Rovine & Christopher Chinn, *The International Arbitrator's Duty to Investigate Conflicts: The United States Approach*, 5 TRANSNAT'L DISPUTE MGMT. 1 (2008) (discussing various bar associations' requirements that arbitrators make reasonable investigations into conflicts of interest).

29. IBA GUIDELINES, *supra* note 22, § 7(a).

30. See *id.* § 7 cmt. ("It is the arbitrator or putative arbitrator's obligation to make similar enquiries and to disclose any information that may cause his or her impartiality or independence to be called into question.").

31. *Id.* § 7(b).

remain independent. The essential requirement is the honesty with which the arbitrator should disclose in order to permit the parties to concretely assess his or her situation in the parties' eyes. Nonetheless, an erroneous or otherwise incomplete statement should not automatically lead to a recusal of the arbitrator or to annulment of the award. According to the Supreme Court of the United States, "[A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."<sup>32</sup> In such case, the judge will assess the impact that may be reasonably expected in the parties' eyes of such situation on the independence and impartiality of the arbitrator.<sup>33</sup>

Should the obligation to disclose be more stringent concerning the chair of the arbitral tribunal or the sole arbitrator than regarding co-arbitrators? International arbitration law and practice make no distinction among members of an arbitral tribunal who all perform an adjudicative role.<sup>34</sup> The case law of the Court of Appeal of Paris has given its greatest extent to the duty of independence by considering an arbitrator under the same obligation as a judge in this regard: "[T]he independence of the arbitrator is essential to his judicial role, in that from the time of his appointment he assumes the status of a judge, which excludes any relation of dependence, particularly with the parties."<sup>35</sup>

Equating an arbitrator to a judge appears to be at variance with practice.<sup>36</sup> Nomination of a co-arbitrator, as is widely known and accepted, has been described in the famous words of a reputed practitioner, Martin Hunter, "[w]hen I am representing a client in arbitration, what I am really looking for in a party nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias."<sup>37</sup> Professor

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32. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring).

33. *Qatar v. Creighton*, Cour d'appel [CA] [regional court of appeal] Paris, 1<sup>e</sup> ch., Jan. 12, 1996, 1996 REV. ARB. 428 (Fr.).

34. POUDRET & BESSON, *supra* note 20, at 366.

35. Galliard & Savage, *supra* note 4, at 565 (quoting Cour d'appel [CA] [regional court of appeal] Paris, June 2, 1989, 1991 REV. ARB. 87 (Fr.)).

36. P. BELLET, DES ARBITRES NEUTRES ET NON NEUTRES, ETUDES EN L'HONNEUR DE PIERRE LALIVE, HELBING AND LICHTENHAHN 399 (1993).

37. M. Hunter, Ethics of the International Arbitrator, *The Journal of the*

Fadlallah has described that “[a] system whereby each of the parties chooses an arbitrator is hardly likely to result in a tribunal which is totally indifferent to the parties and their concern.”<sup>38</sup> Professor El Kosheri and Mr. Karim Youssef write: “[P]arties commonly have a two-fold approach to independence. They have a legitimate expectation of independence and judge-like behavior from the arbitrator appointed by the opposing party, while they expect partiality from their own arbitrator.”<sup>39</sup> As compared, the parties are less likely to waive the independence of the chair of the Tribunal or of the sole arbitrator, as this would otherwise result in an imbalance in the constitution of the arbitral tribunal which would threaten the equilibrium between parties. Because the chair or sole arbitrator guarantees that the arbitral tribunal as a whole functions in an impartial manner, the obligation to disclose should be considered with higher standards.<sup>40</sup>

### C. WHAT AN ARBITRATOR SHOULD DISCLOSE

An exercise of practical guidance to what an arbitrator should disclose is given in the IBA Guidelines on Conflicts of Interest in International Arbitration of 22 May 2004.<sup>41</sup> French case law traditionally holds that,

[a]n arbitrator is under a duty to disclose all circumstances which may reasonably call into question his independence in the mind of the parties and should particularly inform the parties of any relationship which is not common knowledge and which could be reasonably expected to have an

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Chartered Institute of Arbitrators, November 1987, p. 219.

38. Ibrahim Fadlallah, *L'ordre Public Dans Les Sentences Arbitrales* [Public Order in Awards], 249 HAGUE ACADEMY OF INT'L L. 369, 379 (1994).

39. El-Kosheri & Youssef, *supra* note 25, at 47–48.

40. Cf. Neil Kaplan & Karen Mills, *The Role of the Chair in International Commercial Arbitration*, in THE ASIAN LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION 119 (Michael Pryles & Michael J. Moser eds., 2007) (“[The Chair] must oversee all administrative matters as well as procedural and substantive matters; be the key liaison among the parties and the other arbitrators, between the tribunal and the administering institution, if any, and sometimes must even mediate between the other arbitrators where not everyone sees eye to eye.”).

41. See IBA GUIDELINES, *supra* note 22, pt. 2 (listing and categorizing what an arbitrator should disclose).



impact on his judgment in the parties' eyes.<sup>42</sup>

The duty to disclose is widely recognized and easy to formulate,<sup>43</sup> but its application to concrete circumstances is subject to discussion.

The *Nidera v. Leplatre* judgment of the Paris Court of Appeal on December 16, 2010, illustrates a widely known judgment that renders pointless the arbitrator's duty to disclose. The claimant argued that one co-arbitrator had not disclosed that he was the chairman of a professional association of which the defendant was a member. The Court of Appeal found that this situation was publicly known by all involved in agricultural trade, including the applicant, and underlined that the defendant was one among the eight hundred competing members of the professional association chaired by the co-arbitrator. As a consequence, claimant's objection to the regularity of the constitution of the arbitral tribunal as a ground for annulment of the award was rejected. The situation was close to giving rise to an estoppel as the Court of Appeal remarked that *Nidera* had not challenged the chairman of the tribunal during the arbitration proceedings in spite of this publicly known fact.<sup>44</sup> Another example is when the relationship is trivial and no disclosure is needed, such as in *Tecso*, where the chairman of the Arbitral Tribunal was a friend on Facebook of the defendant's counsel. The Court of Appeal held that this circumstance had no bearing on the arbitrator's independence or impartiality.

The relationship of an arbitrator with another member of the same arbitral tribunal may raise questions of his or her impartiality if such relationships result in the expression of one single opinion that is

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42. See, for example, the judgments of the Court d'appel of Paris on September 9, 2010, in *Allaire v. SGS Holding* and of March 10, 2011, in *Allaire, Nykcool v. Dole France and Agrunord et al.*, and in *Tecso v. Neoelectra Group*. Cour d'appel [CA] [regional court of appeal] Paris, June 2, 1989, 1991 REV. ARB. 87 (Fr.).

43. The new Article 1456 of the French Code of Civil Procedure spells out after the January 13, 2011 Reform that "[b]efore accepting a mandate, an arbitrator shall disclose any circumstances that may affect his or her independence or impartiality. He or she shall disclose promptly any such circumstance that may arise after accepting the mandate." CODE CIVIL [C. CIV.] art. 1456 (Fr.).

44. Article 1466 of the Code of Civil Procedure provides that after the reform of January 2011, "[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity." C. CIV. art. 1466.

counted twice instead of the addition of two independent opinions, as should be the case.<sup>45</sup> In the *Emivir, Loniewski, Gauthier v. ITM* judgment of July 2011, the relationship between the chairman of the arbitral tribunal and a co-arbitrator was under attack by the applicant, who claimed that it cast doubt on the impartiality of the entire arbitral tribunal. The applicant contended that the regular contribution of the chairman to a law review on the editorial board of which a co-arbitrator sat created an intellectual and pecuniary link between them. The Court of Appeal of Paris answered that there is no interference between the duties of an arbitrator and participation in a law review and, consequently, held that neither a relationship of subordination nor a business relationship could be said to exist as claimed by *Emivir et al.* The Court concluded that, in the circumstances of the case, there was no proof of actual bias on the part of the chairman of the tribunal in the eyes of a fair-minded observer. This reference to a third-party observer departs from the reference generally made to the parties' mind or the parties' eyes. It should be said that the test for disclosure is not about what the arbitrator may think about his or her situation but, rather, about what may raise a reasonable suspicion in the parties' mind as to the independence and impartiality of the arbitrator.<sup>46</sup> However, arbitrators may find it difficult to discover what is in the parties' mind. Reference to a fair-minded observer, which should be taken to mean a fair-minded or reasonable party, brings some objectivity in an otherwise overly subjective exercise for the arbitrator. In the circumstances of the *Emivir* case, the Court said that there was no obligation for the chairman to disclose his participation in the law review to the parties.

If we now turn to case law concerning non-trivial conflicts of interest, the globalization of world trade and commerce also concerns

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45. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 29, 2002, JCP 2003, I, 105, obs. J. Béguin (Fr.).

46. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 16, 1999, 1999 REV. ARB. 308 (Fr.) (noting that the duty of the judge on appeal is to assess whether the circumstances were likely to cause either party to have a reasonable doubt as to the independence and impartiality of the arbitrator); see also Rep. of the Comm'n on Int'l Trade Law, 43d Sess., June 21–July 9, 2010, Annex I, art. 12, U.N. Doc. A/63/17; GAOR, 65th Sess., Supp. No. 17 (2010) (“Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”).

legal services including those offered in international arbitration. Cooperation among businesses increases in order to meet new market opportunities. In such context where large international law firms are serving clients in many jurisdictions, potential conflicts are also increasing. As was pointed out by Professor El Koshari, “[w]hat matters in the large majority of cases is not the existence of business or personal relations, but the declaration of such relations by the arbitrator. It is secrecy that is the problem.”

In this area, the Court of Appeal of Paris recently handed down a number of important decisions that added significant detail regarding an arbitrator’s obligation to disclose. The first is the judgment of September 9, 2010 in *Allaire v. SGS Holding*. *Allaire*, alleged in the arbitration proceedings that the co-arbitrator nominated by *SGS* had a significant consulting practice with the defendant’s counsel. The co-arbitrator replied that he had indeed provided such services to the law firm representing the defendant but added that he had not done any work for this law firm since the beginning of the arbitration. However, he declined to give any further information as to the amount of fees received for his consultancy work. The Court held that the co-arbitrator’s relationship with the defendant’s counsel was neither occasional nor had it happened in the distant past and concluded that such circumstances could give rise to reasonable doubts in the claimants’ eyes. It decided to annul the award that had been rendered by the arbitral tribunal within twelve days after the information given to the parties by the co-arbitrator, finding that *Allaire* had raised objections relating to the constitution of the arbitral tribunal in the course of the arbitration. Therefore, the matter was not estopped from being heard before the Court.

In two other decisions from March 2011, *Nykcool v. Dole France and Agrunord et al.* and *Tecso v. Neoelectra Group*, the Court of Appeal annulled awards for lack of independence and impartiality of the arbitrators. In *Nykcool*, all the members of the arbitral tribunal declined to make any statement regarding their independence. The chairman, on behalf of the Arbitral Tribunal, merely expressed the arbitrators’ regret about the claimant’s suspicious attitude. The Court of Appeal held that the arbitrators’ refusal to disclose their relationships with the parties raised a reasonable doubt about their independence and impartiality. Moreover, it stressed that the co-arbitrator nominated by the defendants was involved in other arbitral

proceedings with the defendants. The Court's holding, that arbitrators should disclose their relationships with parties, deserves total approval.

For example, in *Tecso*, the co-arbitrator nominated by the defendant had been of counsel between 1989 and 2000 with the same law firm as defendant's counsel in the arbitration and had given only vague information regarding his activity with said law firm after 2000. The Court of Appeal found that this attitude gave rise to reasonable doubts regarding the co-arbitrator's independence and impartiality.

These three cases shed light on the practical application of the arbitrator's obligation to disclose all circumstances concerning the existence of professional and financial association with counsel in the case. When an arbitrator knows of a potential conflict, a failure to disclose is indicative of a lack of independence. The *Allaire* judgment notes the "*elliptic character*" of the statement made by the impugned co-arbitrator and the *Tecso* case refers to the vague information provided by the co-arbitrator nominated by the defendant about the number of legal opinions given to the law firm of defendant's counsel after 2000. In *Nykcool*, no disclosure was ever made. The arbitrators' failure or spontaneous refusal to disclose their relationships with the parties' counsel, as well as their continued failure to disclose full information in this regard, so seriously affected the relationship of confidence with the parties that they could no longer be trusted regarding the accuracy of the information finally disclosed.

*Sobrior and Potier v. ITM and La Violette*, decided by the Paris Court of Appeal on July 1, 2011, illustrates the opposite situation where the chairman had on his own initiative disclosed to the parties at an early stage in the arbitration that he had chaired arbitral tribunals in cases involving the franchisor party and mass marketing businesses. Although the chairman of the Arbitral Tribunal had failed to disclose a prior appointment as arbitrator by a franchising company unrelated to the group of companies of the franchisor party involved in the arbitration proceedings, the Court of Appeal held that the chairman's incomplete statement raised no doubts as to his independence or impartiality.

The aforementioned case law is an invitation to arbitrators to

disclose any kind of relationship they may have with the parties and their counsel, even at the risk of appearing overly cautious.

#### D. WHEN AND HOW A REVIEW OF AN INSTITUTIONAL DECISION ON INDEPENDENCE AND IMPARTIALITY OF ARBITRATORS SHOULD TAKE PLACE

The existence or absence of independence and impartiality on the part of an arbitrator in the challenge of an award proceeding is a question over which French Courts enjoy full reviewing power.<sup>47</sup> For reasons that pertain to the loyalty and efficiency of the proceedings, the issue of the independence and impartiality of an arbitrator must be raised, whenever possible, in the course of the arbitration proceedings in order to be considered as an admissible ground for challenge of the validity of the award.<sup>48</sup> In a similar vein, arbitration rules provide for a time limit for bringing a request for challenge after information of the facts or circumstances on which the challenge is based.<sup>49</sup> It is a well-settled question in French arbitration law that the Rules of the arbitration institution nominated in the arbitration agreement “[c]onstitute the laws of the parties and must be applied to the exclusion of all other laws.”<sup>50</sup> The contractually

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47. See Phillipe Leboulanger, Note, *Cour de cassation (1re Ch. Civile) 6 Janvier 1987*, 1987 REV. ARB. 469, 473 (1987) (stating that the Supreme Court for Judicial Matters held that Courts of Appeal are not restricted in their ability to examine both the legal and factual elements concerning allegedly flawed arbitration).

48. See *Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ.*, July 6, 2005, 2005 REV. ARB. 993 (Fr.) (finding that a failure to raise objections at the time of arbitration makes later objections inadmissible under the doctrine of estoppel); see also CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1466 (Fr.) (“A party which knowingly and without good cause fails to timely object to an irregularity during arbitration is deemed to have waived the right to appeal.”).

49. See C.P.C. art. 1468 (“The arbitrator shall fix a date on which the matter will adjourn for deliberation. After this date, no objection or motion may be made. No representations may be made nor evidence produced, except at the request of the arbitrator.”).

50. *Raffineries de Homs et de Banias*, supra; see also C.P.C., art. 1485 (“When a court hears an action to set aside an arbitration award, it decides the merits within the same framework as the arbitrator, unless the parties agree otherwise.”); see also Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Oct. 28, 1988, 1990 REV. ARB. 497 (Fr.) (stating that the question of alleged lack of independence and impartiality may only be analyzed by reference to the Rules

agreed upon time limit in the Arbitration Rules is binding on the arbitration institution and the parties, but it does not bind the court that has an independent assessment on the admissibility of lack of independence and impartiality as a ground for challenging the award. The reviewing court exercises a different type of control than that of the arbitration institution.<sup>51</sup> This does not preclude the courts from reviewing the exercise of powers of the arbitration institution in connection with challenge or replacement of an arbitrator in proceedings on the validity of the award.<sup>52</sup>

In the case of an institutional or administered arbitration, however, no judicial recourse can lie against the decision of an arbitration institution, either by way of a setting aside action as ruled by the Court of Appeal of Paris in the *Opinter* judgment of 1985 or by way of a direct attack as decided in 1985 by the same Court in the *Raffineries d'Homs et de Banias* case.<sup>53</sup> There is only an indirect review in the course of the challenge proceedings of the award if it is impugned on the ground of an irregularity in the constitution of the arbitral tribunal.<sup>54</sup> This absence of judicial remedy explains in the context of the prohibition of any interference by State Courts in the organization and implementation of the arbitral proceedings by the arbitral institution whenever such institution has acted in accordance with its rules. Moreover, the Court of Appeal of Paris ruled in

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of Arbitration of the French Association for Cocoa Commerce because the arbitration agreement stipulated those Rules should be applied).

51. Compare C.P.C. art. 1485 ("An arbitration award is not subject to objection or appeal."), with Leboulanger, *supra* note 47 (explaining that, although parties may not directly appeal an arbitration award, a Court of Appeal may examine how the arbitrators reached decided the award and whether they violated any rules to which they are subject).

52. See Leboulanger, *supra* note 47 (explaining that an appellate court may review whether arbitrators should have been removed for failing to the conditions of the arbitration contract).

53. Ernest Mezger, Note, *Cour d'appel de Paris (1re Ch. suppl.) 15 janvier 1985*, 1986 REV. ARB. 87 (1986) (stating that when an arbitration is institutionalized, French law respects the freedom of the parties to contract for these rules and the removal of an arbitrator should therefore be through the institution's rules and not judicial review so long as an award has not yet been rendered).

54. See Leboulanger, *supra* note 47 (holding when a Court of Appeals hears a challenge to an award, it is limited to hearing issues related to violations of the rules of the arbitration and the rights of the defense and may not hear arguments relating to the award itself).

*Raffineries d'Homs et de Banias* that a decision on challenge of the ICC International Court of Arbitration is an administrative measure and does not have the legal nature of a judicial act.<sup>55</sup> Because the ICC International Court of Arbitration does not perform a judicial function, the finality of the decision on a challenge that is laid down in the ICC Arbitration Rules does not preclude public Courts from reviewing independence and impartiality of arbitrators as an independent ground of challenge of the award.<sup>56</sup> Final decision on independence and impartiality of arbitrators is also in English law and not left to the decision of the arbitration institution. The provisions of the 1996 English Arbitration Act<sup>57</sup> concerning the requirements of impartiality are regarded as matters of mandatory public policy and, as a result, the Courts make a final determination on the issue.<sup>58</sup>

A distinction should be drawn between two situations. In the first case, like in *Opinter*,<sup>59</sup> the arbitration institution rejects the challenge of the arbitrator. Therefore, the issue revolves around the independence and impartiality of the said arbitrator, who has rendered the award to be examined by the Court in the context of a review. In the second case, such as was the case in *Raffineries de Homs et de Banias*, the challenge of the arbitrator had been accepted by the arbitration institution. The decision of the ICC international Court of Arbitration took immediate effect, and a new arbitrator had been nominated. Is the solution of awaiting the making of the award

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55. Cour d'appel [CA] [regional court of appeal] Paris, May 15, 1985, 1985 REV. ARB. 141 (Fr.).

56. See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 12, 1996, 1996 REV. ARB. 428 (Fr.) (holding that it is an undisputed that courts may review the independence and impartiality of arbitrators).

57. Arbitration Act, 1996, c. 23, § 24(1)(a) (U.K.) (granting courts the power, upon application by a party, to remove an arbitrator when "circumstances exist that give rise to justifiable doubts as to the [the arbitrator's] impartiality").

58. Lord Steyn, *England: The Independence and/or Impartiality of Arbitrators in International Commercial Arbitration*, in INTERNATIONAL CHAMBER OF COMMERCE, INDEPENDENCE OF ARBITRATORS: 2007 SPECIAL SUPPLEMENT 91, 95 (2008) (stating that parties may not leave the final decision on independence and impartiality to be decided under the rules of an institutional arbitration court, but that a legal court has the final determination as a matter of public policy).

59. See Mezger, *supra* note 53 (holding that where an arbitrator has failed to recuse himself upon a request by a party, an appeal may be taken after the award is finalized so long as a timely objection is made).

before challenging it on the ground of an improper constitution of the arbitral tribunal such as established by the case law of the Court of Appeal of Paris in 1985 in *Raffineries de Homs et de Banias* a satisfactory one? Without waiting for the award, shouldn't the damage be cured by a review of the arbitration institution's decision to accept the challenge?

It must be acknowledged that review of the independence and impartiality of arbitrators at the setting aside or enforcement of award stage becomes devoid of much sense when an arbitrator has been replaced by the arbitration institution in the course of the arbitration proceedings. If the objecting party can adduce evidence that the arbitration institution has failed to act in pursuance of its Rules, there is room for intervention of the court acting in support of the arbitration.<sup>60</sup> This solution can be deduced from the *Sté Chérifienne des Pétroles* judgment of 1991.<sup>61</sup> The aggrieved party may also bring proceedings against the arbitration institution to hold it liable for its action in connection with the challenge.<sup>62</sup> Such judicial action would not characterize as interfering in the arbitration proceedings because the review of the administrative decision of the arbitration institution actually remains outside the exercise of the arbitral tribunal's power to adjudicate the merits of the dispute.

It has been held by the Court of Appeal of Paris that courts cannot suspend or terminate the contract between the arbitration institution and the parties to the arbitration agreement as soon as the arbitral tribunal has been constituted.<sup>63</sup> The arbitration agreement, which is

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60. See CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1459 (Fr.) (granting Courts of Grande Instance jurisdiction to support arbitration proceedings); Leboulanger, *supra* note 47 (holding that a court may review whether an arbitrator followed the rules of arbitration); see also Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 18, 1991, 1996 REV. ARB. 503, 505 (Fr.) (holding a court may not interfere with the procedures of an arbitration unless a violation of the agreed rules for arbitration is acknowledged or proven by a party).

61. TGI Paris, 18 January 1991, *Sté Chérifienne des Pétroles v. CCI*, Rev. arb. 1996.503, note by Ph. Fouchard.

62. See Pierre Bellet, Note, *Tribunal de grande instance de Paris (référé) 13 juillet 1988 – société R.E.C.E.C. et Pharaon v. société Uzinexport Import et Chambre de commerce internationale*, 1989 REV. ARB. 97, 101 (Fr.) (positing that a party may claim damages against an institutional arbitrator if it has committed a gross violation of the rules of arbitration).

63. Cour d'appel [CA] [regional court of appeal] Paris, 1e civ., Nov. 18, 1987, 1988 REV. ARB. 657 (Fr.) (reversing the judgment of a trial court to suspend an



within the exclusive purview of the arbitral tribunal according to the competence-competence principle, must be carefully distinguished from the agreement of the parties to the arbitration with the arbitration institution.<sup>64</sup> In the Cubic case for example, the Court of Appeal of Paris and the Cour de cassation ruled over a claim to hold the contract with the ICC void.<sup>65</sup> In a like manner, in the case of *Raffineries de Homs et de Banias*, the damage claim by this Syrian party against the ICC for the alleged wrongful dismissal of the co-arbitrator nominated by them raised no concern regarding the arbitrators' jurisdiction to adjudicate the merits of the dispute. Moreover, *Raffineries de Homs* adduced no evidence that the ICC violated its Rules, and its claim was held inadmissible.

The exclusion of all direct legal remedy against the challenge decision made by an arbitral institution raises an issue regarding the right of access to a court that is protected by Article 6 of the European Convention on Human Rights.<sup>66</sup> Regardless of its nature, administrative or other, the challenge of an arbitrator is a decision with important consequences for the arbitration and should be

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arbitration on the grounds that the proper supportive role of a court is to allow arbitrators space to fulfill their responsibilities to provide a fair arbitration through the exercise of powers legitimately given by consent of the parties).

64. See CLAY, *supra* note 2, at 115 (defining the competence-competence principle as the ability of the arbitral tribunal to determine the extent of its jurisdiction to hear matters relating to the arbitration agreement); *id.* at 153 (stating that both the travaux préparatoires of the UNCITRAL Model Law and French jurisprudence recognize the distinction between the express autonomy of arbitration agreements and the principle of competence-competence).

65. See Cour d'appel [CA] [regional court of appeal] Paris, 1<sup>e</sup> civ., Sept. 15, 1998, 1999 REV. ARB. 103, 109–10 (Fr.) (holding that where it is shown that party clearly manifested its acceptance of an arbitration agreement, the trial court was correct to rule that the contract was valid and that arbitration must proceed as laid out therein); see also Thomas Clay, Note, *Cour de cassation (1<sup>re</sup> Ch. civile) 20 février 2001*, 2001 REV. ARB. 511 (2001) (offering that the validity of an arbitration agreement in a contract should be distinguished by reference to the particular center for arbitrage: if the contract is ambiguous about the reference, it will only be valid if the parties both agree to the center expressly or implicitly; if the contract is specific about the center, it will be valid as soon as one party contacts the center, thereby completing the offer and acceptance necessary to form a common law contract).

66. See *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (Ser. A) at 12–18 (1975) (holding that the right to bring a civil claim before a court is fundamental, and positing that if this right is remote or effective access a court is hindered, even in a temporary character, that the claimant may have been denied this right).

distinguished from the administrative and organizational decisions otherwise made by the arbitration institution. There should be room for an immediate application to the court against the decision on challenge of the arbitration institution. As a consequence, the position of the French courts should be reversed.